

Repatriation of Prisoners of War During Hostilities—A Task Unsuited for the Private Citizenry

I. Introduction

On September 2, 1972, the Foreign Ministry of North Vietnam issued a statement announcing the repatriation of three American pilots held captive by the North Vietnamese. The statement indicated that the pilots would be released "... to a U.S. social organization animated with goodwill and a desire to bring about an early end to the U.S. war in Viet Nam. . . ." It was asserted that this organization would "... help those released not to be used in activities against the Vietnamese people and the Government of the Democratic Republic of Vietnam." The release statement also made reference to three earlier prisoner returns of a comparable nature in 1968 and 1969, each involving three pilots and an escort group comprised of American citizens who were actively opposed to the war in Southeast Asia. The message charged that:

In 1969 the U.S. Government compelled the U.S. pilots released in July that year to put forward distortion [*sic*] about the humane treatment policy of the government of the DRV. At complete variance with their previous statements the U.S. Government had also used those released pilots in war activities against the Vietnamese people and other peoples of Indochina. It is for this reason that such releases have been temporarily suspended. . . .

The point was reiterated with reference to this news release as follows:

The government of the DRV draws particular attention of the U.S. government to this: in the interests of the families of the U.S. pilots captured in North Vietnam stop using the released pilots to slander the DRV and further the U.S. policy of aggression in North Vietnam.

The "social organization" to which the three U.S. pilots' were later released was a collection of individuals known as the Committee of Liaison with Families

* Captain, U.S. Army, JAGD; Associate Professor, International and Comparative Law, University of Virginia; J.D. University of Texas Law School (1971); M.A. International Affairs, George Washington University (1968); B. A., Texas A. & M. (1966). Member, Texas Bar Association, American Bar Association, American Society of International Law, International Bar Association.

¹Air Force Major Edward K. Elias, Navy Lt. JG Norris Alphonzo Charles, and Navy Lt. JG Markham Gartley.

of Servicemen Detained in North Vietnam.² The Committee's representative escort group was comprised of its two co-chairmen, Cora Weiss and David Dellinger, the Reverend William Sloan Coffin, Jr., Chaplain of Yale University, and Professor Richard Falk of Princeton University. Each family of the three released flyers was invited by Hanoi to send a relative to take part in the return process. As a result, representatives of two of the pilots' families accompanied the escort group to Hanoi.

Professor Falk, a member of the Liaison Committee's escort group, has recently urged that the procedure by which the three American pilots were returned to the United States creates a precedent with international law relevance.³ This assertion is partially based on an analysis of the return process made within the context of specific articles of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW).⁴ Although no attempt is made to imply a formal application of the Convention's procedural articles of prisoner repatriation, Professor Falk urges that at least one article⁵ of the GPW does cast authoritative light "... on what the treaty-drafting governments, and particularly the U.S. Government, regarded as *reasonable* [emphasis supplied] in a situation in which no governmental actor was available to carry out the humanitarian mandates of the Convention."⁶ It is his further contention that, at least in the absence of revision of the GPW, "... this release provides guidelines and experience as to repatriation during hostilities to a belligerent power and affirms the capacity of a nongovernmental organization of private citizens to play a direct role in this process."⁷

In a well-reasoned response to these contentions set forth by Professor Falk, Professor Howard Levie has advanced a vastly different interpretation of the applicable international law.⁸ In so doing, however, he has, in his own words, discussed the relevant legal aspects "... independently of the facts alleged and the arguments advanced in the article by Professor Falk." As a result, his

²The Committee of Liaison was established in January of 1970 as a result of discussions in Hanoi between American peace activists and a North Vietnamese citizens' group, the Vietnam Committee of Solidarity with the American people. Committee of Liaison Press Release, April 7, 1970, at 1-2. New York, New York. An examination of the Committee's letterhead indicates that at the time of the release of the three U.S. flyers, Committee membership included David Dellinger and Cora Weiss, Co-chairmen; Mrs. Anne Bennett, Treasurer; and Richard J. Barnett, Rennie Davis, Madeline Duckles, Prof. Richard Falk, Rev. Richard Fernandez, Norman Fruchter, Maggie Geddes, Steve Halliwell, Prof. Donald Kalish, Stewart Meacham, Prof. Bea Seitzman, Prof. Franz Schurmann, Ethel Taylor, Barbara Webster, and Trudi Young.

³Falk, *International Law Aspects of Repatriation of Prisoner of War During Hostilities*, 67 AM. J. INT'L L. 465 (1973) [hereinafter cited as Falk].

⁴U.S.T. 3316; T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as GPW].

⁵*Id.* at art. 10.

⁶Falk, *supra* note 3, at 475-76.

⁷*Id.* at 478.

⁸Levie, *International Law Aspects of Repatriation of Prisoners of War During Hostilities: A Reply*, 67 AM. J. INT'L L. 693 (1973) [hereinafter cited as Levie]. Reference will be made to Professor Levie's Reply to Professor Falk throughout this article.

analysis has not been totally responsive to some rather innovative and thought-provoking legal conclusions and proposals postulated by Professor Falk. Moreover, Professor Levie appears to exhibit a tendency to speak in terms of the traditional World War II context and fails to examine the possibility that prisoner repatriation guidelines applicable to an "all-out armed conflict" may have little relevance to the latter twentieth century's limited wars of "self-determination" and "anti-colonialism."⁹

With these thoughts in mind, it will be the purpose of this article to speak to Professor Falk's contentions on an issue-by-issue basis. In so doing, the author will demonstrate that no reasonable *legal* analysis of the GPW accords any degree of international legitimacy to the return process of the three American pilots in which Professor Falk participated. Additionally, it will be shown that a policy argument based on humanitarianism, advanced in support of the activities of the Committee of Liaison, is unpersuasive in light of the deleterious effect these activities could have on the GPW. Finally, attention will be focused on the suggestion that, in the absence of any revision of the present Convention, the Committee's actions must be viewed as establishing guidelines for similar PW returns in future conflicts and an affirmation of the capacity of nongovernmental organizations of private citizens to play a direct role in repatriation during hostilities.¹⁰

II. The Return of the American Pilots

On September 16, 1973, the escort group of the Committee of Liaison, together with the mothers of two of the American pilots to be returned, arrived in Hanoi. The group gained custody of the three flyers on September 17. The release of the pilots consisted of a transfer of control from the North Vietnamese Army to a spokesman of a North Vietnamese citizens' organization, the Committee of Solidarity. This organization then transferred custody to the Committee of Liaison.

Between September 17 and 24, the three released pilots, together with their relatives and the four members of the escort group, were quartered in an Hanoi hotel. Social activities and visits to heavily bombed areas were organized by the North Vietnamese Solidarity Committee for the benefit of the pilots, their

⁹Professor Falk has responded to Professor Levie's article by means of a letter in 68 AM. J. INT'L L. 104 (1974). In so doing, he makes no attempt to deal with the legal problems posed by Professor Levie. Professor Falk merely sets forth policy arguments as to why private individuals must be allowed to "fill the law vacuum" which he asserts surrounds the repatriation of PWs. He insists that governments are not to be entrusted with an exclusive lawmaking role in a public international law context. In the sense that a "law vacuum" does exist with regard to repatriation of PWs by small groups of private citizens, Professor Falk is correct. Such citizens have never been regarded by international law as proper agents for dealing with what is basically a matter of nation state concern. Thus, no international convention speaks to the involvement of private citizens in PW returns.

¹⁰Falk, *supra* note 3, at 478.

parents, and members of the Liaison Committee. However, it is reported that there was no obligation on the part of the pilots or the other Americans to take part in these activities.¹¹

On September 22, members of the escort group sent the following cablegram to President Nixon from Hanoi:

We are happy to report that Navy Lt. Markham Gartley, Air Force Major Edward Elias, and Navy Lt. JG Norris Charles have been released to our custody so that we may escort them home to the United States.

In accordance with the expressed expectations of the North Vietnamese Government, and in order not to jeopardize the possibility of future releases, we believe the repatriation of these men should be carried out in the following manner:

(1) The men shall proceed home with us and representatives of their families in civilian aircraft.

(2) The men, if they wish, shall be granted a 30 day furlough.

(3) The men shall receive a complete medical checkup at the hospital of their choice, civilian or military.

(4) The men shall do nothing further to promote the American war effort in Indochina.

We believe that these terms are reasonable and humane and in the best interests of the remaining pilots and their families.¹²

The U.S. Government made no response to this cable, either directly or indirectly.

On the same day, September 22, the pilots sent a second cablegram to President Nixon:

In the best interests of all parties concerned we think we should be allowed to return to New York with the escort delegation and be allowed to spend a few days with our families, if so desired.¹³

This cable also met with no response.

On September 25, the escort group, together with the pilots and their parents, departed Hanoi by plane and proceeded to Peking. From Peking, the group flew to Moscow. Upon their arrival in Moscow on September 27, the pilots were met by several representatives of the United States Embassy, who recommended that the pilots consider returning to the United States by means of a U.S. Medevac plane. The pilots declined this offer. On that same morning, the group departed Moscow and landed at Copenhagen for a stopover and change of planes. Once again, the pilots were met by U.S. Embassy representatives who suggested the pilots consider a return to the United States by Medevac. As before, the pilots declined this offer.

Upon their arrival at Kennedy Airport in New York on the evening of September 28, the pilots were met by U.S. Government representatives who boarded the plane and informed them that they would immediately be flown to the military hospital closest to their area of residence for medical treatment and

¹¹*Id.* at 466.

¹²*Id.* at 467.

¹³*Id.* at 467.

observation. It is reported that this arrangement was acceptable to one of the returned flyers but that the other two pilots desired to meet with the press, attend a reception in the airport vicinity planned by the Committee of Liaison, and visit with their families for several days before reporting for a checkup and debriefing. These two pilots eventually agreed to report for medical care and debriefings at that time; although, in the words of Professor Falk, it was not "... altogether clear whether the [two] pilots were given any orders to this effect or whether only a more informal kind of insistence was relied upon by government officials."¹⁴ All three pilots were given medical checkups, debriefed, and allowed to visit with their families and talk with the public.¹⁵

III. The International Legal Issues

The first legal issue addressed by Professor Falk in the context of the return process of the American flyers is the applicability of the GPW to such a situation. In so doing, he notes that, throughout the war, North Vietnam vehemently denied the applicability of any of the 1949 Geneva Conventions,¹⁶ choosing instead to characterize downed American pilots as "war criminals" under their reservation to Article 85 of the GPW that was included in their instrument of ratification.¹⁷ The United States did, of course, consistently reject this invocation of the Article 85 reservation and insisted that North Vietnam apply this Convention, *en toto*.¹⁸ Moreover, although Professor Falk states that the U.S. Government merely "... by implication ... indicated an acceptance of corresponding obligations toward enemy personnel,"¹⁹ the United States did, *in*

¹⁴*Id.* at 468.

¹⁵The facts surrounding the return of the three American pilots are taken directly from Professor Falk's summation of them in his article.

¹⁶The U.S. and the governments of North and South Vietnam are each party to the four Conventions concluded under the auspices of the International Committee of the Red Cross at Geneva on August 12, 1949. These are Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949 [1955], 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, [1955], 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949 [1955], 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 [1955], 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

¹⁷Article 85 of the GPW provides that "Prisoners of War prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention." GPW, *supra* note 4 at Article 85. North Vietnam's reservation to Article 85 is as follows:

The Democratic Republic of Vietnam declares that prisoners of war prosecuted and convicted for war crimes or for crimes against humanity, in accordance with principles laid down by the Nuremberg Court of Justice, shall not benefit from the present Convention, as specified in Article 85.

¹⁸Much has been written regarding the applicability of the GPW to U.S. PWs in the Vietnam War. For varying views on this issue, see Note, *The Geneva Convention and the Treatment of Prisoners of War in Vietnam*, 80 HARVARD L. REV. 851 (1967); Levie, *Maltreatment of Prisoners of War in Vietnam* in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 361 (Falk ed. 1969).

¹⁹Falk, *supra* note 3, at 469.

fact, take affirmative steps to ensure that its military personnel were made aware that the 1949 Geneva Conventions controlled and guided their conduct in the field.²⁰

Having raised the question of the applicability of the GPW, Professor Falk nevertheless proceeds to indicate that the escort group did regard this Convention as a source of authoritative guidelines “. . . to the extent relevant to this type of repatriation.”²¹ It is his analysis of specific articles of the GPW within the context of this particular return process that gives rise to the basic legal issues involved.

Professor Falk initiates his examination of the Convention by pointing out the difficulty of analogizing PW repatriation under the GPW with the return of the American pilots. Moreover, he states, without qualification, that the repatriation of PWs, such as the U.S. pilots, from one belligerent state to another while hostilities are still in progress, is *never* spoken to in explicit terms by the Convention.²² He proceeds to note, however, that perhaps Article 117²³ of the GPW could be deemed relevant to this situation. This conclusion is reached by a process of reasoning that ends in the determination that since this particular article stipulates that no person repatriated under Articles 109 and 110 of the GPW may later be employed on active military duty, the same must certainly hold true for healthy combat personnel returned to a belligerent power *during* hostilities.²⁴ Thus, Professor Falk argues that this prohibition against further active military service must apply to personnel such as the three returned pilots and is squarely in point with the escort group's fourth guideline contained in the cable to President Nixon of September 22.²⁵ He concludes his commentary on this particular aspect of the return process with the statement that the U.S. Government has apparently accepted the applicability of Article 117 in this type of situation.²⁶ Aside from this single article, Professor Falk

²⁰See MACV Dir. 20-4, Inspection and Investigation of War Crimes (25 March 1966, 18 May 1968, 10 July 1970, 2 March 1971, c.l.); MACV Dir. 20-5, Prisoners of War—Determination of Eligibility (15 March 1968); MACV Dir. 27-5, War Crimes and Other Prohibited Acts (2 November 1967); MACV Dir. 190-3, Enemy Prisoners of War (12 February 1968, 23 August 1968, 1 August 1969); MACV Dir. 190-6, ICRC Inspections of Detainee/Prisoner of War Facilities (8 January 1969); MACV Dir. 381-46, Combined Screening of Detainees (27 December 1967).

²¹Falk, *supra* note 3, at 470.

²²*Id.* Part IV of the GPW, which deals with Termination of Captivity, is divided into three sections:

- I. Direct Repatriation and Accommodation in Neutral Countries [art. 109-117].
- II. Release and Repatriation of Prisoners of War at the Close of Hostilities [art. 118-119].
- III. Death of Prisoners of War [art. 120-121].

Professor Falk contends that it is readily apparent that §I does not apply because these pilots were not sick or wounded, nor were they repatriated to a neutral country; that §II does not apply because hostilities were continuing; and that §III does not apply because the men were alive. *Id.*

²³*Id.* art. 117 of the GPW provides that “No repatriated person may be employed on active military service.” GPW, *supra* note 4, at art. 117.

²⁴Falk, *supra* note 3, at 470.

²⁵This fourth guideline is set forth in text accompanying note 12.

²⁶See New York Times, Oct. 11, 1972, at 9.

contends that the GPW gives very little guidance as to reasonable terms regarding this repatriation form.

This analysis of Part IV of the GPW in relation to the return of the American pilots is both incomplete and misleading. By failing to deal with the GPW as a whole and Part IV of the Convention in particular, Professor Falk is able to set forth an apparently credible legal and analytical argument. However, a more thorough examination of the relevant aspects of the Convention serves to demonstrate the superficiality of his approach. Such an examination gives rise to several basic, but extremely significant, questions.

First, does Part IV of the GPW explicitly fail to speak to the direct repatriation of able-bodied prisoners during hostilities? Professor Falk contends that it is "readily apparent" that Section I, Direct Repatriation and Accommodation in Neutral Countries [Articles 109-117], would not apply to prisoners such as the pilots because of the fact that they were not wounded, sick, or repatriated to a neutral state.²⁷ It is interesting to note that this argument is posed in light of, or perhaps disregard for, both the language of the title head of Section I and that of paragraph two of Article 109. Perhaps it is understandable as to how the wording of the title heading alone might be misinterpreted; however, it is difficult to imagine how the same might be true of the text of the article itself.

Article 109—General Observations

Subject to the provisions of the third paragraph of this Article, Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel, in accordance with the first paragraph of the following Article.

Throughout the duration of hostilities, Parties to the conflict shall endeavour, with the co-operation of the neutral Powers concerned, to make arrangements for the accommodation in neutral countries of the sick and wounded prisoners of war referred to in the second paragraph of the following Article. They may, in addition, conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.

No sick or injured prisoner of war who is eligible for repatriation under the first paragraph of this Article, may be repatriated against his will during hostilities.²⁸

It would seem to be apparent that Article 109 of Section I would apply to PWs such as the returned pilots. The second sentence of this article states quite clearly that parties to the conflict *may* conclude *agreements* dealing with *direct repatriation or internment* in a neutral state of *able-bodied* prisoners held for a long period of time. It is evident that the parties are presented with voluntary alternative choices. Thus, they may indeed enter into agreements calling for direct repatriation of able-bodied prisoners during hostilities. The validity of this conclusion is borne out in the language of the most authoritative commentary on the 1949 Geneva Conventions.

²⁷Falk, *supra* note 3, at 470.

²⁸GPW, *supra* note 4, at art. 109.

The wording of this paragraph [Paragraph 2 of Article 109] is in an optional form; it recommends that the belligerent Powers should endeavour to arrange for such accommodation with the co-operation of the neutral Powers concerned, the eligible prisoners of war being defined in Article 110, paragraph 2. Furthermore, it makes provision for the internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity, if they cannot be repatriated directly. . . .²⁹

Why, then, does Professor Falk insist that the direct repatriation of able-bodied PWs during combat is not dealt with in *explicit* terms by the GPW? It is due to the fact that the Convention does not make such repatriations mandatory, as it does those of the wounded and sick? If this is the case, the author would contend that the two forms of repatriation are distinctly different in nature. Virtually all states in the international community recognize both the desirability of and rationale behind the repatriation of wounded and sick personnel.³⁰ However, surely only the most ardent of idealists would hope to win approval of a Convention provision calling for the *mandatory* repatriation of healthy combat personnel. Realism dictates that in instances of full scale armed conflict, the temptation to utilize these individuals would simply be too great, Article 117 notwithstanding.³¹ Thus, *voluntary* agreements to repatriate able-bodied prisoners would appear to be the only practical approach toward this issue.

Perhaps Professor Falk rejects paragraph two of Article 109 as a means of repatriating able-bodied PWs because it is, in fact, *too explicit*. A careful reading of this article leaves no doubt that repatriations of this kind can occur only if *parties to the conflict* conclude *agreements* specifically directed toward this end. No reference is made to groups of private citizens or "agreements" based on a unilateral interpretation of implied consensual silence.³² Thus, regardless of the reasons underlying his rejection of the direct applicability of Article 109, the fact remains that it does exist as the only recognized and codified international legal concept applicable to the situation.

Moreover, there is no necessity for Professor Falk to argue, simply by analogy, that since Article 117 applies to returned wounded and sick personnel, it must be deemed applicable to repatriated able-bodied prisoners as well. The commentary pertaining to this particular article *explicitly* states just this.

²⁹COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 511 (Pictet ed. 1960) [hereinafter cited as COMMENTARY (Pictet)].

³⁰Professor Levie notes, however, that since PW exchanges during hostilities generally turn out to be more advantageous to one side than the other, states have been hesitant to repatriate even the wounded and sick during combat. Levie, *supra* note 8, at 696.

³¹This would obviously be even more true in instances of internal conflict waged by guerrilla bands.

³²In speaking to the legitimacy of the Committee of Liaison and the validity of its activities, Professor Falk asserts that by failing to object to the Committee's designation by North Vietnam as an impartial humanitarian organization, the U.S. Government consented, by its silence and inaction, to the Committee's appointment. This contention is discussed on pages 847-50, *infra*.

However, it also stipulates that the article speaks only to PWs repatriated pursuant to Articles 109 and 110.

A. Repatriated persons.—The Article covers prisoners of war repatriated by the Detaining Power pursuant to Articles 109 and 110, that is to say seriously wounded or seriously sick prisoners of war whom the Detaining Power is required to repatriate regardless of number or rank (Article 109, paragraph 1), prisoners of war accommodated in a neutral country and subsequently repatriated following an agreement between the Powers concerned (Article 110, paragraph 2), and lastly, able-bodied prisoners of war who have undergone a long period of captivity and are repatriated by agreement between the Powers concerned (Article 109, paragraph 2).³³

It is evident that the return of the American pilots in September of 1972 did not occur within the context of Article 109. Thus, there is no sound international legal basis for declaring that the restrictions of Article 117 are specifically applicable to these individuals. The fact that the Department of Defense made a decision not to reassign these pilots to combat duty is certainly no implicit or tacit indication of the U.S. Government's recognition of the applicability of Article 117 to this type of return process. It should be noted, however, that not even Professor Falk has since charged that the government utilized the returned flyers as instruments of "... official or semiofficial pro-war propaganda."³⁴

Although Professor Falk does not speak to it, there does exist still another process, within the context of the GPW, by which able-bodied prisoners may be returned to their state of origin during the conduct of hostilities. This is by means of parole, spoken to in paragraph two of Article 21.

Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend. Such measures shall be taken particularly in cases where this may contribute to the improvement of their state of health. No prisoner of war shall be compelled to accept liberty or parole or promise.³⁵

Note must be taken of the fact, however, that even though the possibility of parole does exist under the Convention, the granting of such is subject to the laws and regulations of the power on which the prisoners depend. U.S. Department of Defense regulations specifically declare that a captured American soldier "... will never sign or enter into a parole agreement."³⁶ This clearly stated prohibition against parole is aimed at efforts the enemy might take to influence and manipulate PWs. It is felt unlikely that captors would gratuitously grant parole to certain prisoners without expecting to reap some

³³COMMENTARY (Pictet), *supra* note 29, at 538.

³⁴Professor Falk contends that previously repatriated PWs were used to disseminate official or semi-official "pro-war" propaganda. Falk, *supra* note 3, at 470. He apparently is referring to talks given by these individuals before various groups around the U.S. and to their testimony before committees of Congress.

³⁵GPW, *supra* note 4, at art. 21.

³⁶DOD Directive 1300.7, inclosure 2 at 1; *See also*, U.S. Army Field Manual 27-10, The Law of Land Warfare, ¶187a (1956; Article III, Code of Conduct for Members of the Armed Forces, Exec. Order No. 10,631, Aug. 18, 1955, 3 C.F.R. 266 (Comp. 1954-1958).

benefit, even if this is only propagandistic in nature. Thus, under the terms of the article itself, paragraph two of Article 21, does not provide a method by which able-bodied U.S. PWs may be returned to the United States during armed hostilities, and it is therefore inapplicable to the topic under discussion.³⁷

As has been indicated, it is Professor Falk's contention that the GPW gives very little guidance with regard to reasonable terms of repatriation during combat. Thus, in his view, the September 22 escort cable detailing the four guidelines which were to control the return process of the American pilots was necessary in order to fill this "vacuum." It is important to note, however, that, as previously shown, agreements calling for repatriation during hostilities are to be made within the context of Article 109. The voluntary, rather than mandatory nature of agreements concluded under this article serves as an explanation as to why the drafters of the Convention felt it impractical to dictate the terms of these compacts. These are matters to be specifically agreed upon by *parties to the conflict*. A certain degree of flexibility in negotiation is deemed essential. Accordingly, neither party may unilaterally specify the "guidelines" for such repatriations.

It is clear that the Committee of Liaison did not fall within the context of Article 109. It was never a party to the conflict in Indochina and thus lacked the capacity to negotiate repatriation terms with the United States, much less dictate them. Only a cursory examination of the escort group's guidelines reveals that these are terms to which no state would be likely voluntarily to agree.³⁸

The remaining legal issues to be spoken to flow out of Professor Falk's contention that the role of the Committee of Liaison in the return of the American pilots can be based on a "reasonable, as opposed to a literal," interpretation of the applicability of Articles 9 and 10 of the GPW "... in a situation in which no governmental actor is available to carry out the humanitarian mandate of the Convention."³⁹ The obvious initial response to such a contention is that the International Committee of the Red Cross (ICRC),⁴⁰ a truly non-governmental actor did consistently make known its willingness to perform the Convention's humanitarian activities, including the

³⁷Historically, there have been three major methods employed by Detaining Powers for the release and repatriation during the course of hostilities of able-bodied prisoners of war—ransom, exchange, and parole. For discussion of each of these methods, see Levie, *supra* note 8, at 693-694.

³⁸These guidelines are set forth in text accompanying note 12, *supra*. Professor Levie asserts that these guidelines displayed either remarkable presumption, remarkable ignorance, or remarkable naivete. For the reasons he gives for this statement, see Levie, *supra* note 8, at 703-706.

³⁹Falk, *supra* note 3, at 476.

⁴⁰The International Committee of the Red Cross was founded in 1863 as the International Committee for Relief of Wounded Soldiers. Its present name was adopted in 1880. Its headquarters are located in Geneva, and its officers are of Swiss nationality. This organization promoted the Geneva Conventions of 1864, 1906, 1929, and 1949 dealing with a series of matters concerning victims of war. It will be referred to throughout this article as the ICRC.

supervision of PW repatriation. The DRV⁴¹ refused all ICRC attempts to act on behalf of American and North Vietnamese prisoners of war. Nevertheless, a thorough analysis of Professor Falk's contention of the "guidance" offered by Articles 9 and 10 necessitates their careful examination. Article 9 of the Convention provides that:

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.⁴²

Article 10 declares:

The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.

When prisoners of war do not benefit or cease to benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power or of an organization provided for in the first paragraph above, the Detaining Power shall request a neutral State, or such an organization, to undertake the functions performed under the present Convention by a Protecting Power designated by the Parties to a conflict.

If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

Any neutral Power or any organization invited by the Power concerned or offering itself for these purposes, shall be required to act with a sense of responsibility toward the Party to the conflict on which persons protected by the present Convention depend, and shall be required to furnish sufficient assurances that it is in a position to undertake the appropriate functions and to discharge them impartially.

No derogation from the preceding provisions shall be made by special agreements between Powers one of which is restricted, even temporarily, in its freedom to negotiate with the other Power, or its allies by reason of military events, more particularly where the whole, or a substantial part, of the territory of the said Power is occupied.

Whenever in the present Convention mention is made of a Protecting Power, such mention applies to substitute organizations in the sense of the present Article.⁴³

In discussing Articles 9 and 10, even Professor Falk points out that several problems exist in conferring a formal status on the Committee of Liaison. Each of these "problems" merits individual attention in the form of responses to four specific questions posed by Professor Falk:

1. Was the Committee of Liaison designated by the Democratic Republic of Vietnam (DRV) as an impartial organization responsible for the protection of American prisoners of war?
2. Did the Committee of Liaison qualify as an "impartial" humanitarian organization?

⁴¹The Democratic Republic of Vietnam (The North Vietnamese government).

⁴²GPW, *supra* note 4, at art. 9.

⁴³*Id.* at art. 10.

3. Did the Committee of Liaison require the consent of the U.S. Government before it could legally serve as the organization empowered to ensure the protection of American PWs?

4. Did the U.S. Government have the right to prevent this form of return process from being used to disseminate anti-U.S. propaganda?

First, was the Committee of Liaison designated by the DRV as an impartial humanitarian organization responsible for the protection of American PWs?

Professor Falk's response is that there was, in fact, no such official or formal designation. However, he urges that a series of dealings on PW matters between the Committee and the North Vietnamese government should be viewed as constituting a formal designation. An examination of the exchange of the American pilots in Hanoi reveals that the Committee took custody of the flyers from an organization described as the Committee of Solidarity, apparently a group of private North Vietnamese citizens. Such an exchange process would indicate that the DRV deliberately chose not to deal directly with the Committee. This type of behavior hardly lends support to a claim of official designation of the Committee by the North Vietnamese government. However, the question as to whether there was or was not an official designation by the DRV of the Committee is, to a certain extent, a moot one. Such a determination would be of importance only if Article 10 allows a Detaining Power to unilaterally designate an organization to undertake the protection of and provide relief for *only* the PWs the Detaining Power has under its control. Professor Falk chooses to address this issue in response to the third question he poses.

Did the Committee require the consent of the U.S. Government before it could legally serve as an impartial organization empowered to ensure the protection of American PWs?

Professor Falk contends that the language of Articles 9 and 10 is ambiguous with regard to whether the U.S. had to agree to the "designation" of the Committee by the DRV. However, he asserts that it is reasonable, in relation to the normal rules of treaty interpretation, to conclude that Article 10(2) does give North Vietnam, as the Detaining Power, the right unilaterally to choose to deal with the Committee for the purpose of carrying out the mandates of the GPW. In support of this argument, he looks to hearings before the Foreign Relations Committee of the U.S. Senate in 1955. In these hearings, the Department of State submitted a statement designed to clarify certain portions of the Geneva Conventions, including a reference to the meaning of Article 10. Speaking to this article, the State Department declared:

Common Article 10 (Article 11 of the Civilian Convention) provides for substitutes for protecting powers when protected persons for any reason do not benefit by the activities of such a power. In such an event, the detaining power is required unilaterally to undertake the functions performed by a protecting power. If such

protection cannot be arranged, the detaining power is obligated to request or accept the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by protecting powers.⁴⁴

The Soviet bloc had set forth a reservation to Article 10, stipulating that they would not accept a designation by the detaining state of a humanitarian organization "... unless the consent of the government of the state of which the protected persons are nationals has been obtained."⁴⁵ The DRV has since made a similar reservation to Article 10.⁴⁶ The initial Soviet bloc reservation was opposed by the State Department at the time it was made. Based on this opposition, Professor Falk concludes that the United States must now view the Detaining Power (in this case, North Vietnam) as having the capacity, or even the duty, to unilaterally designate an impartial humanitarian organization, *i.e.*, the Committee of Liaison.⁴⁷

It is, quite frankly, difficult to understand Professor Falk's rather unique interpretation of the clearly stated provision of Articles 9 and 10. Article 9 could hardly be less ambiguous with respect to whether the parties to the conflict must *consent* to the activities of an impartial and humanitarian organization undertaking to protect and provide relief for prisoners of war.⁴⁸ In speaking to the activities authorized by Article 9, the Commentary stipulates:

All these humanitarian activities are subject to one final condition—the consent of the Parties to the conflict concerned. This condition is harsh but inevitable. The belligerent Powers do not have to give a reason for their refusal. . . . For example, when relief consignments are forwarded, it is necessary to obtain the consent not only of the State to which they are being sent, but also of the State from which they come. . . .⁴⁹

Moreover, a careful examination of Professor Falk's rather novel interpretation of the meaning of Article 10(2) reveals a total lack of legal support for his contention that the DRV could, in this instance, unilaterally designate an "impartial humanitarian organization" as a substitute for a protecting power. With respect to his contention that, due to its opposition of the Soviet bloc reservation to Article 10(2) in 1955, the United States must now recognize the right of the DRV, which has made a similar reservation, to unilaterally designate an impartial humanitarian organization, Professor Levie has made this response:

Inasmuch as the DRV became a party to the 1949 Convention only on the condition

⁴⁴*Hearings on the Geneva Conventions for the Protection of War Victims, Before the Senate Foreign Relations Committee*, June 3, 1955, at 62.

⁴⁵*Id.*

⁴⁶In acceding to the GPW, the DRV made a reservation to Article 10 stating that it would not "recognize as legal" such a request by the Detaining Power "unless the request has been approved by the State upon which the prisoners of war depend." 274 U.N.T.S. 339.

⁴⁷Falk, *supra* note 3, at 475.

⁴⁸See text at note 42, *supra*.

⁴⁹COMMENTARY (Pictet), *supra* note 29, at 109.

that no neutral state or humanitarian organization could be designated by a Detaining Power to act as a substitute for the Protecting Power without the consent of the Power of Origin, it is certainly inverse reasoning to claim that this established the right of the DRV, acting as a Detaining Power, unilaterally so to designate the Committee of Liaison, without the consent of the United States, the Power of Origin.⁵⁰

Moreover, Professor Levie quite accurately points out that Professor Falk, though mentioning State Department opposition to the Soviet bloc reservation to Article 10(2), nevertheless fails to speak to the position officially taken by the United States in connection with the ratification of the 1949 Convention:

Rejecting the reservations which States have made with respect to the Geneva Convention relative to the treatment of prisoners of war, the United States accepts treaty relations with all parties to that Convention, except as to the changes proposed by such reservations.⁵¹

The normal rules of treaty interpretation upon which Professor Falk states he bases his conclusions regarding the applicability of Article 10(2) would appear to refute the idea that the United States must recognize the right of the DRV unilaterally to appoint an impartial humanitarian organization.⁵² These rules would dictate that while the United States has treaty relations with any state which has ratified or acceded to the 1949 Convention with a reservation to Article 10, those treaty relations are subject to the changes made by the reservation. This means that *neither* the United States *nor* a reserving State, when acting as a Detaining Power, may designate a neutral Power or a humanitarian organization as a substitute for the Protecting Power without the approval of the Power of Origin.

Perhaps the basic flaw in Professor Falk's analysis of Article 10(2) is his misinterpretation of the conditions under which the article may be effectuated. Professor Levie has correctly pointed out that Article 10 deals with the activities of Protecting Powers and of substitutes for Protecting Powers, rather than with those of the "impartial humanitarian organization" referred to in Article 9. He thus finds it inconceivable that a group such as the Committee of Liaison could possibly qualify as an organization "offering guarantees of impartiality and efficacy to perform the duties of the Protection Power," the requirements set forth in 10(1) for an organization that may be designated under 10(2).

Although Professor Levie is correct in his interpretation of Article 10(2), he has not spoken to perhaps the major oversight of Professor Falk's interpretative process. The Commentary to the 1949 Convention is most explicit in stipulating that the organization which may be utilized as a substitute for a Protecting Power under 10(2) must be agreed upon by the parties to the conflict.

⁵⁰Levie, *supra* note 8, at 708.

⁵¹*Id.*

⁵²For the normal rules of treaty interpretation regarding the legal effect of reservations, see art. 20-21, *Vienna Convention on the Law of Treaties*, 63 AM. J. INT'L L. 875 (1969). Although this Convention has no retroactive effect, it does embody treaty rules generally regarded as customary international law. See also, PILLOUD, RESERVATIONS TO THE 1949 GENEVA CONVENTIONS 5 (1958).

The text leaves no freedom of choice with regard to the organization whose services may be requested. Only one can be meant, if such a one exists. The words "or such an organization" do not mean any organization which offers all guarantees of impartiality and efficacy. They can refer only to the organization mentioned in the previous line as being "provided for in the first paragraph above," that is to say, an organization appointed by *previous agreement* between the contracting Parties, and consequently *accepted in advance by the Power of Origin*. (Emphasis supplies)⁵³

The Commentary thus appears to refute any contention that a humanitarian organization may be *unilaterally* designated as a substitute for a Protecting Power under Article 10(2).

Perhaps the strongest argument which could have been advanced by Professor Falk in support of his contention of the legitimacy of unilateral designation would have centered around Article 10(3), rather than 10(2). Under this particular paragraph, a humanitarian organization is not expected to fulfill *all* the functions incumbent upon a Protecting Power by virtue of the Convention. Unlike a Protecting Power or its substitute, the organization does not act as an agent, but merely as a voluntary helper concerned with *only* humanitarian functions. Accordingly, the Committee of Liaison, acting under 10(3), would not be subject to the contention of Professor Levie that due to its failure to meet the requirements of 10(1), the Committee could not be designated to function under 10(2). Moreover, if action is taken under 10(3), the Detaining Power is under an affirmative duty to request the intervention of a humanitarian organization or accept an offer made by such an organization.⁵⁴

It would appear, on the surface, that an Article 10(3) argument regarding the correctness of the unilateral designation of the Committee of Liaison by the DRV can be made. However, although it is perhaps a stronger base upon which to legitimate the activities of the Committee, it, too, fails to meet the requirements set forth in the Commentary. In discussing Article 10(3), the Commentary explicitly states that a designation of an organization under 10(3) is to be a "last resort." This action is to be taken only if the Detaining Power, although wishing to apply 10(2), has failed to find a neutral state or an organization spoken of in that paragraph. Not even Professor Falk has contended that the DRV sought out a neutral state to serve as a substitute for a Protecting Power. Moreover, although the ICRC stood ready to function in such a capacity, the DRV refused to accept the services of this organization.⁵⁵ However, the Commentary would appear to indicate that a Detaining Power may refuse an affirmative offer of assistance made by a particular humanitarian organization if it can demonstrate its justification in doing so. In addition, such

⁵³COMMENTARY (Pictet), *supra* note 29, at 119.

⁵⁴*Id.* at 119-120.

⁵⁵Indeed, Professor Falk even speaks of the DRV's attitude of "hostility" toward the ICRC. Falk, *supra* note 3, at 476.

an offer may be rejected if the Detaining Power has sought and received a prior offer of service by another qualified humanitarian body.⁵⁶

In order to demonstrate its compliance with the provisions of 10(3), then, the DRV must have been able to show that it sought but could not find a neutral state or organization to serve as a substitute for a Protecting Power, that it was justified in declining the offer of the ICRC to serve in such a capacity, or that it had, prior to the ICRC offer, obtained the cooperation of the Committee of Liaison, a qualified "impartial humanitarian organization."⁵⁷ Proof of such compliance has never been forthcoming. Accordingly, it would appear that there exists no portion of Article 10 upon which Professor Falk can legally base the activities of the Committee.

There remains for discussion perhaps the most intriguing argument upon which Professor Falk bases the legitimacy of the *unilateral* designation of the Committee. This is the contention that such a designation must be determinative in the absence of an objection from the country whose men are detained that the organization is not "impartial" or "humanitarian."⁵⁸ In other words, Professor Falk argues that the failure of the United States to object to the unilateral designation of the Committee of Liaison does, in fact, constitute consent on the part of the American government to this action.

In support of this argument of "consent by silence," Professor Falk points out that there was never any U.S. Government effort to interfere with or object to the activities of the Committee. Moreover, he contends that the decision of the government not to oppose David Dellinger's application for leave to travel with the escort group when he was free on bail pending an appeal must be viewed as tangible evidence of an implied consent by the United States to Committee activities.⁵⁹ On the basis of these facts, Professor Falk contends that the designation of the Committee as an "impartial humanitarian organization" was, in fact, "a consensual process."⁶⁰ Thus, even though he never specifically states that the failure of the U.S. Government to prevent the return of the three American pilots constituted a "legal" acceptance of the Committee as a validly designated organization, this is certainly the thrust of his reasoning.

Professor Levie has concluded that this particular contention "... does not even appear to warrant discussion."⁶¹ Notwithstanding this sentiment on the part of Professor Levie, however, it is apparent that an argument of "implied

⁵⁶COMMENTARY (Pictet), *supra* note 29, at 119-120.

⁵⁷The commentary which accompanies art. 9 of the GPW sets forth specific requirements which an "impartial humanitarian organization" must fulfill. These are discussed in text accompanying notes 68-79, *infra*.

⁵⁸Falk, *supra* note 3, at 475.

⁵⁹*Id.* at 474.

⁶⁰*Id.* at 477.

⁶¹Levie, *supra* note 8, at 707.

consent" does exist. In speaking to this contention, it is necessary to address five specific issues.

Do Articles 9 and 10 of the 1949 Convention require that the "consent" or "agreement" to which they refer be formalized in written form between the interested parties? An analysis of the Commentary reveals that no mention is made of the necessity for *written* agreement or consent.⁶² Moreover, it has long been an established concept of treaty law that an international agreement need not be in writing.⁶³ Thus, it would appear that neither the Convention nor international law required that the U.S. Government give written consent or agreement to the designation of the Committee by the DRV.

May the national law concepts of consent by silence, *i.e.*, implied consent and estoppel, be utilized in dealings between states in the international community? Surely it can be argued that these are general principles of law, common to all civilized states, and that as such, they constitute a fundamental source of international jurisprudence recognized and applied by international tribunals.⁶⁴

Did inaction and silence on the part of the American government constitute an implied consent to and thus a legitimation of the designation of the Committee by the DRV? Professor Falk urges that the "failure" of the U.S. Government to prevent the action taken by the Committee must be viewed as a consent to its designation. If, in fact, the United States objected to this designation, why did it not say so? Moreover, it would have been a simple process for the government simply to prohibit any Committee activity. It obviously chose to not do so. Furthermore, the government brought no charges under the Logan Act⁶⁵ against the individual members of the Committee involved in the repatriation procedure. All of this inaction on the part of the American government would appear to lend credence to Professor Falk's contention that the release of the American pilots was, in fact, a consensual process. However, perhaps a realistic examination of the particular time period in question and overall government policy might prove otherwise.

To anyone familiar with the degree of division generated in the United States by the Vietnam conflict, the reasoning behind the American government's decision to take no affirmative action to prevent the return of the three U.S. pilots in September of 1972 is not difficult to comprehend. It takes very little imagination to visualize the reaction of the American public to a decision by the Administration to stand in the way of the return of American PWs. Such a move

⁶²COMMENTARY (Pictet), *supra* note 29, at 103-122.

⁶³This fact is noted in art. 3 of the 1969 Vienna Convention on The Law of Treaties. This article states: "The fact that the present Convention does not apply to international agreements . . . not in written form, shall not affect: (a) the legal force of such agreements. . ." *Vienna Convention on the Law of Treaties*, 63 AM. J. INT'L L. 875 (1969).

⁶⁴Indeed, art. 38 of the Statute of the International Court of Justice lists "general principles of law recognized by nations" as a source of international law on which the Court bases its decisions.

⁶⁵18 U.S.C. 953. The purpose of this legislation is to prevent private U.S. citizens from interjecting themselves into the conduct of U.S. foreign affairs.

could have only created further tension and division within the United States. It is difficult to believe that the Committee of Liaison was not fully aware that such was the case. Moreover, various other private American citizens, such as Ross Perot, attempted to arrange for the repatriation of U.S. prisoners of war. At no time did the government stand in the way of any of these individuals. Nor did the Justice Department attempt to prosecute these citizens under the Logan Act. If any or all of these efforts had met with success, could each of these groups then lay claim to the fact that the American government had impliedly consented to its functioning under the GPW as an "impartial humanitarian organization"? Surely the response to this question must be a negative one. Thus, it would appear that a decision to permit *all* private efforts to free American PWs cannot be interpreted as an indication of the fact that the government viewed each of these groups as officially acting on its behalf. Indeed, no private organization ever received official government sanction or approval.

With respect to the Committee of Liaison, the government was most careful to take no action which might have been interpreted as even tacit governmental recognition of any official capacity of the Committee. As Professor Falk points out, the American government never communicated with the Committee's escort group.⁶⁶ In his view "... it seems ... unreasonable for the U.S. Government not to respond either by way of acceptance, reasoned rejection, or through the proffer of an alternative set of guidelines."⁶⁷ Perhaps a bit more realistic view of such behavior would indicate an awareness on the part of the government that any contact with the Committee might immediately be taken as some form of official governmental recognition. This same reasoning undoubtedly led to the government's desire to have the repatriated pilots return by military rather than commercial aircraft. Thus, in the final analysis, it appears that, rather than impliedly consenting to the designation of the Liaison Committee by the DRV, the U.S. Government consciously avoided taking any action which could have been interpreted as official consent to Committee activities.

Having gained the return of three members of its armed services, was the United States, in effect, estopped from denying the validity of the Committee's designation or its activities? That is, having derived the benefits (the return of the flyers) of an "agreement," however implied it might have been, was the U.S. Government estopped from contending that such an agreement never existed? Again, it would appear that a response to this question must be in the negative. What would one have the United States do in this type of situation? Issue a public statement proclaiming no interest whatsoever in the return of the

⁶⁶Falk, *supra* note 3, at 467.

⁶⁷*Id.* at 475.

American pilots? Prevent the return of the PWs altogether? Should the government actually have been required to take these steps in order to protect itself from an estoppel argument raised in connection with the contention that the repatriation was a "consensual process"?

Finally, even if a determination is made that the American government did impliedly consent to the DRV's designation of the Committee, would such an "agreement" confer upon the Committee the status of an impartial humanitarian organization called for in Articles 9 and 10 of the GPW? Suffice it to say that no type of agreement between the U.S. and the DRV could automatically confer international legitimacy upon any organization or its activities. Achievement of such a status comes only when a group meets all requirements set forth in the Convention. Evidence of the fact that the Committee failed to meet these requirements can best be set forth in response to the second of the four questions raised by Professor Falk in his discussion of a "reasonable interpretation" of Articles 9 and 10.

Does the Committee of Liaison qualify as an "impartial humanitarian organization?"⁶⁸

It is only the ICRC or a similar type of body which might undertake the humanitarian activities spoken to in Articles 9 and 10 of the GPW. The Commentary specifically declares that "... the organization's activities must be purely humanitarian in character; that is to say they must be concerned with human beings as such, and must not be affected by any political or military consideration."⁶⁹

In commenting upon the legitimacy of such an organization, Professor Levie contends it must meet three basic requirements. First, it must be impartial in its operation; second, it must be humanitarian in concept and function; and third, it must have some institutional, operational, and functional resemblance to the ICRC.⁷⁰ It is upon the basis of these criteria that he questions the authenticity of the Committee.

The Committee of Liaison was anything but "impartial"; it was more strongly motivated by political than by humanitarian considerations; and its existence as an "organization" within the meaning of the 1949 Convention was, at the very least, debatable.⁷¹

It may be somewhat unjust to question the humanitarian motivations of the Committee, as it would appear that its members were sincerely concerned with the loss of life and suffering involved in the Vietnam conflict. Moreover, an attack on the legitimacy of the Committee based on its lack of organization

⁶⁸Art. 9 and 10 of the GPW speak to this type of organization. For the full text of these articles, see text accompanying notes 42-43, *supra*.

⁶⁹COMMENTARY (Pictet), *supra* note 29, at 107-108.

⁷⁰Levie, *supra* note 8, 698.

⁷¹*Id.* at 702.

along the lines of the ICRC is perhaps a bit tenuous. However, Professor Levie is correct in questioning the Committee's impartiality. In so doing, he details the great publicity which surrounded the release of the three American pilots and the fact that these PWs, as well as others before them,⁷² were released to well-known anti-war individuals.⁷³ Moreover, he sets forth a well-reasoned concept of what he believes to be true "impartiality" in this type of situation.

An "impartial" organization is one which, as an institution, is unbiased and unprejudiced, fair and equitable to both sides in its operations, one which neither by act nor by statement gives any indication that it prefers one side over the other.⁷⁴

Finally, Professor Levie contends that although the GPW does not require that an "impartial" organization be international or neutral, he finds it "almost inconceivable" that an organization which is based in the territory of one belligerent would be permitted to function in the territory of an opposing belligerent, no matter how "impartial" it was reputed to be.⁷⁵

While such facts and arguments do evidence a lack of impartiality on the part of the Committee, it would appear that there exists even stronger proof of the fact that this organization was committed to certain political positions on the war and that it actively sought to promote them throughout the United States. Professor Falk has indicated that even though the Committee of Liaison was exclusively composed of American citizens who had taken a public position against the U.S. role in Indochina, it "... did not seek to do more in relation to prisoner issues than to serve its humanitarian purposes and to disseminate its views on the condition of camps and how to secure the repatriation of other prisoners."⁷⁶ Yet, Committee newsletters sent to the families of American PWs often contained articles critical of American policy and questioned government concern for the imprisoned servicemen. Examples of these articles can be found in the newsletters of 30 October 1970, 21 March 1971, and 8 June 1971.⁷⁷ A brief passage from one is representative of the Committee's "impartial" approach.

Many of you have said you are not political and have no position on the war. Whether you think of yourself as political or not, that isn't the way life works. . . . As you may know, the Amendment to End the War comes up before the Senate for a vote on June 22. If this legislation is passed by the Congress and ratified by the President, setting the date for total withdrawal of troops and cutting off appropriations for use in and over Indochina, it would trigger immediate arrangements for release of prisoners.

⁷²Professor Levie identifies these previously released pilots. Levie, *supra* note 8, at nn. 45-48.

⁷³Levie, *supra* note 8, at 702-703.

⁷⁴*Id.* at 698.

⁷⁵*Id.* at 699. Despite the Commentary to the GPW and Professor Levie's interpretation of "impartiality," Professor Falk continues to insist that the GPW is "vague and ambiguous" with regard to the qualifications of an impartial humanitarian organization. Falk, note 9, *supra*.

⁷⁶Falk, *supra* note 3, at 473.

⁷⁷Newsletters of the Committee of Liaison with Families of Servicemen Detained in North Vietnam. The address from which these letters were mailed was listed as 365 West 42nd Street, New York, N.Y. 10036.

There are approximately 44 committed votes in the Senate. Many of you ask what can be done. Certainly public pressure on our elected representatives could push this bill over the hill.⁷⁸

Surely, public pronouncements such as this fly in the face of the Commentary's explicit stipulation that an "impartial" humanitarian organization's activities must not be affected by *any* political or military consideration. Thus, it would appear that due to its proven lack of the degree of impartiality demanded of it by Article 9 of the GPW, the Committee failed to achieve an internationally legitimate status.

Professor Falk poses one last question in his discussion of the Committee's legitimacy in terms of Articles 9 and 10 of the Convention.

Did not the U.S. Government have some protection against the use of the process of repatriation to disseminate hostile propaganda?

That is, why should North Vietnam not be expected to deal with a "genuinely"⁷⁹ neutral organization? His response is very brief. Instead of offering some feasible explanation for the DRV's refusal to deal with the ICRC, he attacks the U.S. Government for its "reliance" on various "pro-war" groups interested in the PW issue. No effort is made to define what this governmental "reliance" was. As has been indicated, the American government gave no official sanction to any group of private citizens working for the return of PWs.

Admittedly, some element of propaganda is generally associated with every prisoner exchange. However, the U.S. Government, as well as all other governments, parties to the GPW, does have the right to expect that it will be protected from the distribution of enemy propaganda to the fullest extent possible. This protection can be offered only in the form of the impartial humanitarian organization spoken to in the convention. Thus, as a signatory to this international agreement, the DRV is not only "expected" but obligated under law to deal with such a body. Its rejection of the ICRC, a universally recognized organization specifically spoken to in the Convention, in favor of a group of private American citizens sympathetic to its cause, is quite simply, a violation of its treaty commitments.

Finally, Professor Falk contends that the "impropriety"⁸⁰ of the DRV's action (apparently its rejection of the ICRC and its unilateral designation of the Committee of Liaison) can only be assessed by reference to whether there has been a "substantial"⁸¹ fulfillment of the humanitarian purposes underlying the Convention. In other words, he appears to be saying "As long as some humanitarian benefit is derived through our efforts (as defined by those of us

⁷⁸Committee Newsletter of 8 June 1971, at 1-2.

⁷⁹Professor Falk places this word in quotes in his article.

⁸⁰This word is used by Professor Falk. Apparently this is an acknowledgment of improper behavior on the part of the DRV.

⁸¹The implication appears to be that there was, in fact, substantial fulfillment of the humanitarian purposes of the GPW by the Committee.

involved in the process) let's not worry too much about whether we act in accordance with the applicable law." Succinctly stated, the end justifies the means. Hopefully, for the sake of all codified law, domestic as well as international, such reasoning will never prove to be persuasive.

In the view of Professor Falk, these are the four "problems" with conferring a formal status on the Committee of Liaison. The arguments he sets forth in discussing these issues have been responded to in order to demonstrate the Committee's failure to achieve any degree of legitimacy within the context of the applicable international law.

IV. The Policy Issues

In concluding his article, Professor Falk deals with what he categorizes as the underlying policy issue involved in the return process. "How do we interpret the release and repatriation of three prisoners out of a prisoner population in North Vietnam of several hundred?"⁸² In speaking to this question, he initially contends that there simply exists no satisfactory explanation for the actions of the DRV. However, he then proceeds to set forth, in the form of a series of questions, a most persuasive argument that North Vietnam was indeed motivated by a desire to foster hostile propaganda in connection with the release:⁸³

Why else did they [the DRV] release the men into the custody of anti-war leaders?

Why else did they provide tours of the bombed areas and entertainment for the released men and their relatives?

Why was it insisted [sic] that the released men be returned to the American people rather than the American government?

Why was a route arranged that was indirect and proceeded as fast as possible by way of countries opposed to American policy in Vietnam?

Why was the release timed to coincide with a pre-election period in which the Administration's war and prisoner policy was under attack by the opposition candidate?⁸⁴

Professor Falk chooses not to respond to these questions, for the answer to each appears to confirm the obvious. The DRV saw the Committee as a group of concerned Americans who could be manipulated into serving as extremely valuable propaganda agents. The release of the three American pilots in September of 1972 was simply an effective use of the Committee members as such.⁸⁵ Professor Falk, however, contends that this kind of North Vietnamese motivation is of no account. He insists that at least some humanitarian benefit was gained.⁸⁶ Again, this appears to be an indication of a reasoning process that

⁸²Falk, *supra* note, at 477.

⁸³Professor Levie raises similar questions. Levie, *supra* note 8, at 709.

⁸⁴Falk, *supra* note 3, at 478.

⁸⁵Professor Levie speaks to how each release of a token number of American PWs to anti-war groups was utilized as a major propaganda device by the DRV. Levie, *supra* note 8, at 709.

⁸⁶Falk, *supra* note 3, at 478.

is willing to overlook a total violation of the established international concepts of repatriation in order to achieve the goals of a small group of private U.S. citizens. This is not to say that all Americans did not share in the joy of having three American servicemen returned to their families. However, thoughtful consideration must be given as to whether the manner in which they were returned promoted the best interests of the hundreds of PWs who remained behind. Moreover, the activities of the Committee of Liaison give rise to what appears to be the most fundamental of policy issues. Did the return of the three pilots by a process which sanctioned the DRV's blatant disregard for the dictates of the GPW outweigh the damaging effect this type of repatriation procedure might have on the utility of the Convention in future conflicts? It is the author's belief that any degree of legitimacy accorded to the activities of the Committee in the name of humanitarianism would be a significant step toward vitiating an international convention carefully designed to provide humanitarian safeguards for *all* men and women engaged in hostilities, rather than to only a chosen few.

V. Conclusions

Professor Falk has set forth the proposition that the process by which the repatriation of the American pilots occurred creates precedence with significant international law relevance. This contention is partially based on what he believes to be a reasonable interpretation of the relevant articles of the GPW. It is possible that such a repatriation procedure may indeed prove to have a substantial impact on international law. However, its future significance will not be the result of its proven legitimacy in terms of the current Convention. A careful analysis of the relevant articles of the GPW has shown that no reasonable *legal* interpretation of its terms indicates compliance with its requirements by either the DRV or the Committee of Liaison. Professor Falk is simply incorrect when he states that the Convention does not provide for repatriation of PWs during hostilities. Article 109 provides for this in explicit terms. This particular article requires, however, that parties to the conflict *agree* to the terms of such a repatriation process. As has been demonstrated, this agreement never occurred. Perhaps aware of the failure to meet this stipulation, Professor Falk attempts to base the legitimacy of the DRV's unilateral designation of the Committee as an "impartial humanitarian organization" on a "reasonable" interpretation of Articles 9 and 10 of the GPW. In responding to the four "problems" he suggests are inherent in such a designation, it has been shown that first, there was no formal designation of the Committee by the DRV. The North Vietnamese government simply *utilized* the Committee as an effective element of propaganda. Second, the Committee did not qualify as an "impartial" organization. Evidence has been offered in proof of the fact that this group of American citizens actively opposed the efforts of the U.S.

Government in Vietnam. Third, the activities of the Committee were never consented to by the United States. A decision to allow various groups of private citizens to attempt to arrange a return of PWs cannot be interpreted as an official governmental sanction of the activities of any one body. Moreover, even if such inaction on the part of the U.S. Government is viewed as some form of consent to the activities of the Committee, this consent does not legitimate the Committee or its actions in terms of the GPW. Fourth, the American government, as well as all other governments, does have some form of protection against the use of PW repatriation as a means by which to distribute hostile propaganda. This is the GPW requirement that PW returns which occur within the context of Articles 9 and 10 of that Convention be conducted through a truly impartial humanitarian organization agreed upon by the parties. Thus, the fact that a state has ignored the requirements of an international agreement designed to safeguard the rights of all PWs cannot be justified on the basis that this violation of international law has resulted in a humanitarian benefit to a few individuals.

Perhaps aware that the activities of the Committee cannot be legitimated in terms of the Convention, Professor Falk suggests that, in the absence of any GPW revision, such a repatriation procedure must be viewed as simply providing guidelines for similar PW returns in future conflicts. Moreover, he asserts that the Committee's actions conclusively affirm the capacity of nongovernmental organizations of private citizens to play a direct role in prisoner repatriation during hostilities.

If these contentions are accepted as reasonable and desirable by the international community, the Committee of Liaison's repatriation procedure *will* prove to be of significant international law relevance. Is there any real possibility of this occurring? Professor Levie would apparently think not. He asserts that the future significance of the activities of the Committee conducted in connection with the return of the U.S. flyers will be minimal. This view is based on his belief that in an "all-out armed conflict," private repatriation by civilians would not be practical. He foresees that these individuals would be tried and convicted of treason or for communicating with the enemy, that limitations would exist on wartime travel across international borders, and that the close censorship of the news media would mitigate against any propaganda value to be gained by the release of a token number of carefully selected PWs.⁸⁷

There would appear to be one flaw in Professor Levie's analysis of the future significance of the Committee's activities. He has based his reasoning process on the premise that all future conflicts will, in fact, be "all-out armed wars." Recent history would seem to indicate otherwise. The international community now finds itself embroiled in an age of limited warfare, internal conflicts waged

⁸⁷Levie, *supra* note 8, at 710.

in the name of "self-determination" and "anti-colonialism." Perhaps these are the types of conflicts in which Professor Falk views groups such as the Committee as playing major roles. In speaking to the future activities of such organizations, he suggests that the humanitarian objectives of the GPW may have to be realized in a "flexible" manner that is responsive to the characteristics of a particular armed conflict.⁸⁸ In other words, "as the present Convention is too restrictive in its legal requirements, each party involved in hostilities must be allowed to unilaterally determine how it will respond to simply the 'spirit' of the Convention." He further asserts that in "particular" armed conflicts, "... a private organization of nationals of the 'enemy' state may be more acceptable to the Detaining Power in certain situations than either the International Committee of the Red Cross or a neutral or even a friendly third power government. . . ."⁸⁹

In order to reaffirm the utility of the GPW and to ensure that PW repatriations remain in the hands of governments and truly qualified humanitarian organizations, Professor Falk's contentions must be emphatically and totally rejected. Only then can the international community ensure that the Committee's activities will indeed prove to be of little future significance. Moreover, rejection of these assertions does have a logical and legal base.

The activities of the Committee of Liaison can hardly be considered as establishing "guidelines" for PW exchanges during internal conflicts. The possibility of such exchanges occurring during these types of hostilities is, at best, remote. The possibility of private citizens serving as "go-betweens" for the government and insurgents is even more so. Moreover, individuals taken into custody during internal conflicts are not categorized as prisoners of war within an international law context. Their treatment is exclusively dictated by the applicable domestic legislation and Common Article 3 of the Geneva Conventions. The "poor guerrilla" syndrome which has become so popularized during the past several years cannot serve as a basis for obviating the effect of this law.⁹⁰

⁸⁸Falk, *supra* note 3, at 477.

⁸⁹*Id.*

⁹⁰Common Article 3 of the 1949 Geneva Convention is the only article applicable to non-international conflicts. It reads as follows:

In the case of armed conflict *not of an international character* occurring in the territory of one of the High Contracting Parties, *each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*

(1) *Persons taking no active part in the hostilities*, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;

It is perhaps even more important that the Committee's activities not be interpreted as guidelines for PW repatriation during future conventional, but limited, warfare. To do so would be to weaken the viability of the GPW, and this is a step the international community can scarcely afford to take. This is true not simply because the Convention *is* the law but because it still remains the *best* and most workable means by which to ensure PW repatriation. As has been shown, Article 109 of the Convention calls for the repatriation of prisoners during hostilities. The "flexibility" desired by Professor Falk is provided in the sense that parties to the conflict are free to agree to the specific terms of the return process. Moreover, it is submitted that this agreement between the governments involved is the key to the success of the entire repatriation procedure. As Professor Levie has demonstrated, states have never shown an inclination to repatriate healthy PWs while hostilities are still in progress. However, if such exchanges are ever to occur, each party to the conflict must have a negotiated guarantee that its interests will not be compromised, that the return of its captured personnel will take place in accordance with *predetermined* guidelines, and that it will not become a victim of carefully orchestrated enemy propaganda. It is readily apparent that "guidelines" such as those proposed by the Committee while in Hanoi do not offer these guarantees. These may be given only by governments of states negotiating within the context of the Convention. For these reasons, no sovereign state will look upon the manipulated activities of the Committee as establishing a rational or legal precedent for the repatriation of captured personnel during future conflicts. The GPW remains the best and only hope of achieving PW returns of this kind.

It is a distinct probability that the United States is the sole country within the international community that would allow a group of its private citizens to engage in activities particularly detrimental to its national policies and war efforts. Perhaps such charity on the part of the U.S. Government can be viewed as an indication of its inherent strength and security. It is submitted, however, that the failure of the United States to prevent *all* private efforts to secure the release of American PWs was an unfortunate and costly legal, as well

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- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by *civilized* peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the Conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

GPW, *supra* note 4, art. 3.

as policy, decision, one symptomatic of a government attempting to avoid further national divisiveness. It was a unique decision brought about by unusual circumstances. Hopefully, with the recent passage of the War Powers Bill,⁹¹ the conditions prompting this decision will never again be present in the United States. Individuals engaging in activities similar to those of the Committee of Liaison in a war supported by Congress and the American people will, as Professor Levie asserts, undoubtedly be prosecuted under a revised and enforceable Logan Act.⁹² The same fate would most probably befall similar individuals everywhere in the world who have proven themselves to be more acceptable to their nation's enemy as an "impartial humanitarian organization" than has either the ICRC or a neutral power. In matters so vital to the well-being of nation states, it is essential that they speak and act *only* through their governments.

In the final analysis, the activities of the Committee are shown to be devoid of any form of legal precedent. They can be legitimated neither in terms of the applicable international law nor on the basis of some final humanitarian result. Rather than serving as guidelines for future actions of a similar nature, they are, in fact, the result of the government's unfortunate decision to allow several Americans to enter into a process totally unsuited for the private citizenry.

⁹¹P.L. No. 93-148. The Act provides that when the President commits U.S. troops to hostilities abroad or "substantially" enlarges the number of U.S. troops equipped for combat in a foreign nation, he must report to Congress within 48 hours the circumstances, authority, and scope of the action. Moreover, he must stop the operation after 60 days unless Congress approves his action, though it may be continued for 30 more days if the President deems it necessary to protect American forces. Congress may order the operation halted within that period by passing a concurrent resolution that would not be submitted to the President for possible veto.

⁹²As it now exists, this Act has consistently been circumvented or totally ignored as an instrument to prosecute individuals who have interfered in the conduct of U.S. foreign relations. If not substantially revised, it must be replaced by legislation which the Department of Justice will be willing to enforce.